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Comment on Proposed FCC Rule: Cyber Security Certification Program

As a law student and a consumer of broadband services, I am concerned that the proposed rule establishing a Cyber Security Certification Program delegates too much authority—authority that the Commission itself may not have—to private actors. The Commission appears to have made an effort to avoid the thorny questions about delegating rulemaking authority by emphasizing that the participation in the program will be voluntary on the part of the Internet Service Providers (ISPs). But this provision does not solve all the problems inherent in the delegation, since the cyber security program will inevitably implicate the rights of consumers and other Internet users whose interests are not aligned with the ISPs, and who will have no say as to what extend will be impacted by the regulation. Indeed, the proposed rule's total silence with respect to consumer rights, privacy rights, and First Amendment rights indicates that the certification authority—comprised of private industry actors and charged with formulating specific rules implementing the Commission's broad policy objectives—will have no guidance on how to balance these private, constitutional interests against the stated objective of maintaining heightened security. Because that certification authority will be wholly insulated from political accountability, there is no way of guaranteeing that the industry will not formulate rules that benefit the ISPs at the expense of Internet users.

As an initial matter, as the Commission acknowledges, it is beyond the agency's statutory jurisdiction to regulate network management practices. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). Delegating that regulatory authority to a private body,

however, does not solve that initial difficulty, since the agency cannot delegate authority that it does not have. Furthermore, the fact that participation is voluntary does not cure the legal and policy-related concerns that make delegation problematic in the first place. The Supreme Court emphatically rejected as unconstitutional the practice of allowing the industry to propose its own rules, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—even when the rulemaking body must ultimately answer to the politically accountable Executive; even when the statute specifies that the rules cannot violate specific conditions that look after the public interest; and even when the rules proposed in large part affect only the industry itself, without endangering the private constitutional rights of third parties.

The Commission's proposed rule is in many ways more problematic than the rule rejected in *Schechter Poultry*. In *Schechter Poultry*, Congress impermissibly delegated its own rulemaking functions, whereas here, the Commission is attempting to delegate rulemaking authority it does not have. The Commission is itself an independent agency that is to some extent insulated from democratic accountability; and for it to delegate rulemaking power to a private body exacerbates the potential of abuse by the ISPs who are authorized to formulate its own governing rules. The ISPs accountability to market pressures is not a satisfactory safeguard, since the ISPs can infringe upon the rights of Internet users that are not the ISPs own consumers. For example, a political or religious organization might attempt to distribute mass emails that, for "security" reasons, are blocked out as spam. This organization would suffer a violation of its First Amendment rights without any clear guarantees that it can seek redress, or if it does seek redress, that it can have its complaint heard by an impartial adjudicator.

Indeed, the proposed rule's silence on how the certification authority or the Commission will balance and adjudicate the rights of third party Internet users and consumers raises the danger that it may attempt to exercise adjudicatory functions that it does not have. A long line of Supreme Court cases have established that an agency may not usurp the role of Article III courts, particularly when the controversy does not arise out of rights conferred by agency action. *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22 (1932); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). While a grievance that one participating ISP might have against the certifying body could be characterized as arising out of agency action, and thus within the Commission's jurisdiction, most third party grievances are likely to fall squarely within the jurisdiction of Article III courts. For example, an Internet user may have relied on an ISP's fraudulent representations that it met a particular cyber security standard; the ISP would certainly have to answer to the certifying authority under the proposed rule, but that proceeding would not resolve any fraud claims the Internet user might wish to bring against the ISP. Such claims are private claims that must be heard by an Article III court, and the proposed rule's silence on how jurisdiction in these matters might be shared or divided does not protect, with sufficient clarity, the Internet user from being forced to submit to the agency hearing because of cost and efficiency pressures.

Moreover, even if the agency adjudication were to be deemed an acceptable and efficient alternative to the federal courts, the aggrieved Internet user would not have access to this forum except on appeal. The proposed rule provides that the initial

adjudication will be heard by the private enforcement body, and that the Commission itself will only be involved in appeals from adverse decisions. This structure is problematic for two reasons. First, the Internet user would be forced to have his or her grievance first heard by a tribunal composed of industry actors—the very people whose interests are aligned with the Internet user's adversary. Second, the Internet user is at least two degrees removed from any kind of judicial review by an Article III court. He or she would have to go through both the private enforcement body and the Commission first, and that requirement could very well make the option of litigation prohibitively costly for the Internet user.

The scheme the Commission proposes, in which it lays almost the entire onus of regulation on the private sector, is deeply flawed and should not be implemented. Rather, the Commission should forbear making important policy decisions regarding cyber security until Congress has given it express authorization and clearer guidance on what form these regulations should take.